IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRANK C. WHITTINGTON, II,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2291-VCP
	)	
DRAGON GROUP L.L.C.,	)	Appeal No. 392, 2009
THOMAS D. WHITTINGTON, JR.,	)	
RICHARD WHITTINGTON,	)	
L. FAITH WHITTINGTON,	)	
DOROTHY W. MINOTTI,	)	
MARNA A. McDERMOTT,	)	
SARAH I. WHITTINGTON,	)	
RUTH A. WHITTINGTON,	)	
MATTHEW D. MINOTTI, and	)	
DOROTHY A. MINOTTI,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: October 6, 2010
Decided: February 11, 2011

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PARSONS, Vice Chancellor.

This is the latest installment of a long-running dispute between Frank Whittington and his siblings over ownership of a Delaware business. The Whittingtons have come to the Court of Chancery on several occasions asking it to resolve disputes among the siblings regarding their assets and those of their deceased ancestors. After conducting a trial in this action, I ruled that laches prevented Frank from pursuing his claimed ownership interest. Frank appealed this decision to the Delaware Supreme Court, which ruled that the analogous statute of limitations is twenty years instead of three, as I had held. On remand, I concluded that when viewed in the context of a twenty-year limitations period, the evidence did not support barring Frank's claim for laches. Defendants unsuccessfully appealed that decision, and the Supreme Court remanded this matter for consideration of Plaintiff's claims on the merits.

In the motion now before the Court, the other Whittington siblings seek leave to file a Second Amended Answer and Counterclaims in light of the Supreme Court's initial decision and my subsequent opinion on remand. For the reasons stated in this Memorandum Opinion, I deny Defendants' motion to amend.

I. BACKGROUND

A. The Parties

Plaintiff, Frank C. Whittington ("Frank"), brought this action to force his siblings to recognize his alleged membership in Dragon Group, L.L.C. ("Dragon Group"), a

Delaware limited liability company.[1] Defendants include Frank's four siblings, each of whom are members of Dragon Group. They are: Thomas D. Whittington, Jr. ("Tom"), Richard Whittington, L. Faith Whittington, and Dorothy W. Minotti (collectively, the "Defendants").[2]

B. Facts and Procedural History

The factual and procedural history of this case is recited in *Whittington I* and summarized by the Supreme Court in its decision remanding the question of laches to this Court.[3] Therefore, I highlight only briefly here the relevant portions of that history.

1. Facts

On June 14, 2001, Frank and a number of his siblings settled a prior dispute by entering into an Agreement in Principle (the "AIP"). The AIP provided, among other things, that based on Frank's share of stock in Whittington Ltd. ("Ltd."), another family-owned entity, he would be entitled to carry forward an interest into Dragon Group. Although Dragon Group existed in 2001, Frank and his siblings had not yet agreed to the terms of a formal operating agreement for that company. On September 23, 2002, Tom distributed an Offering Memorandum to all Ltd. members, offering them a stake in Dragon Group and proposing terms for the operating agreement. To accept the offer,

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1 *Whittington v. Dragon Gp. L.L.C. (Whittington I)*, 2009 WL 1743640, at *1 (Del. Ch. June 11, 2009), *rev'd*, 2009 WL 4894305 (Del. Dec. 18, 2009).

2 Unless otherwise noted, all background facts recited in this Opinion are drawn from *Whittington I* and are supported by the evidence cited therein.

3 *Whittington v. Dragon Gp. L.L.C. (Whittington Remand)*, 2009 WL 4894305, at *10 (Del. Dec. 18, 2009).

Ltd. members had to pledge all of their Ltd. stock and return to Tom a signed copy of the Offering Memorandum by October 15, 2002. Frank complied with the Offering Memorandum's requirements, except that he increased the 17.77% number listed as his percentage share in the operating agreement portion of the Offering Memorandum to reflect approximately the share to which he believed he was entitled (24%).

In November 2002, Tom informed Frank's counsel that Dragon Group deemed Frank's changes to the operating agreement to be a counteroffer, which they rejected. Frank then filed in a previous action a Motion for Order Compelling Defendants' Compliance with Court Order and Directing Performance by Substitute (the "2002 Motion"). Vice Chancellor Lamb denied the 2002 Motion in a Letter Opinion dated March 4, 2003 (the "March 2003 Opinion").[4] There, the Court ruled that the "terms of the [Dragon Group] LLC operating agreement will be those that were established at its inception, adjusted to reflect Frank Whittington's ownership interest."[5] Frank interpreted the quoted language to mean that he was a member of Dragon Group and that his interest was at the increased level he had indicated. Defendants, however, interpreted the Court's denial of the 2002 Motion to mean that they had prevailed and Frank had *no* interest in Dragon Group. Hence, Defendants thereafter refused to recognize Frank as a member of Dragon Group.

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4 *Whittington v. Farm Corp.*, C.A. No. 17380, slip op. at 4-5 (Del. Ch. Mar. 4, 2003). *Id.* at 4-5.

5 *Id.*

In May 2003, Frank became frustrated by Defendants' refusal to provide him with Dragon Group's financial information. Because of this and disputes over various family-owned entities, Frank proposed that his siblings buy out his interests in all of those entities. The Sibling Defendants rejected Frank's proposed buy-out on July 7, 2003 and advised Frank's counsel that they did not consider Frank a member of Dragon Group.

In August 2003, the Sibling Defendants held annual shareholders meetings for the various family-owned entities. Although Frank attended meetings for other entities, his siblings excluded him from Dragon Group's annual meeting on the ground that he had no interest in Dragon Group.

In April 2004, Frank received a K-1 from Dragon Group. But, on April 14, 2004, Tom sent Frank a letter informing him that the K-1 was sent by accident. That letter explicitly stated that Frank was not a member of Dragon Group.

In late 2004, Dragon Group called on its members to make a capital contribution. In response, on January 12, 2005, Dragon Group received $36,152 from its members. Notice of the capital call was not sent to Frank and he did not contribute.

In October 2005, during settlement negotiations between Frank and his siblings, Tom and Frank discussed a buy-out proposal whereby either party could buy out the other. In related correspondence with Frank, Tom acknowledged that Frank still asserted an interest in Dragon Group.

The parties never reached a settlement, and Frank eventually filed this action to establish his rights in Dragon Group.

2. Procedural History

Frank filed his Complaint in this action on July 20, 2006 against Dragon Group and the Sibling Defendants. On October 25, 2006, Frank moved for summary judgment, which I denied on May 8, 2007. On June 22, 2007, Frank amended his Complaint to add the remaining Defendants.[6] In February 2008, Defendants moved for summary judgment based on the equitable defense of laches. I denied that motion in early June 2008 on the eve of trial. One of the issues the parties briefed on Defendants' motion involved what the analogous statute of limitations was for purposes of a laches analysis.[7] In ruling on Defendants' motion, I held the analogous statute of limitations was three years, and not twenty years, as Frank had argued.[8] I then held a four-day trial from June 10 to 13, 2008 and heard post-trial argument on January 30, 2009.

At trial, Frank sought three types of related relief. He requested that the Court (1) enforce Dragon Group's operating agreement and uphold his claimed 23.65% interest in it, (2) provide an accounting of Dragon Group's profits to enable a determination of his share, and (3) compel Dragon Group to disburse his proportionate share of its profits.

Defendants argued that either the statute of limitations or the doctrine of laches barred Frank from bringing his claims. They further contested Frank's claimed interest in

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6 In September 2007, Frank dismissed his claims against Defendant Marna C. Whittington without prejudice.

7 *Whittington v. Dragon Gp. L.L.C.*, 2008 WL 4419075, at *4-5 (Del. Ch. June 6, 2008).

8 *Id*.

Dragon Group and argued that if he had such an interest, it was less than the 23.65% he claimed. In response, Frank asserted that the doctrines of res judicata, collateral estoppel, and judicial estoppel precluded Defendants' defenses.

On June 11, 2009, I ruled in *Whittington I* that the doctrine of laches barred Frank's claim. In doing so, I relied on my earlier decision that the analogous statute of limitations for his claim was three years. On appeal, Frank argued that because his claim was based on breach of a contract under seal, the analogous statute of limitations was twenty years, and not three. The Supreme Court agreed and remanded to this Court for reconsideration the issue of whether laches still would bar Frank's claim in light of its holding that the applicable analogous limitations period was twenty years.[9]

On remand, I concluded in a February 15, 2010 Memorandum Opinion[10] that, within the context of a twenty-year analogous statute of limitations, Frank's claim is not barred by laches. Defendants then appealed that decision. By Order dated June 21, 2010, the Supreme Court affirmed my February 15, 2010 ruling rejecting Defendants' laches defense and remanded this matter "for consideration of Plaintiff's claims on the merits."[11] On July 9, 2010, Defendants filed the pending Motion for Leave to File Second Amended Answer and Counterclaims (the "Motion to Amend" or "Motion"). The parties

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9 *Whittington Remand*, 2009 WL 4894305.

10 *Whittington v. Dragon Gp. L.L.C. ("Whittington III")*, 2010 WL 692584 (Del. Ch. Feb. 15, 2010).

11 Docket Item ("D.I.") 222.

subsequently briefed and argued this Motion in conjunction with their supplemental submissions on the merits. This Memorandum Opinion reflects my ruling on the Motion to Amend. I will address the merits of Frank's claims in a separate opinion.

C. Parties' Contentions

In their Motion, Defendants seek to add counterclaims for mutual mistake, unilateral mistake, and reformation. Defendants urge this Court to grant their Motion to Amend because the Supreme Court's reversal of my initial finding of laches amounted to an intervening change of law. They argue that, notwithstanding the Supreme Court's decisions, they should be permitted to present evidence demonstrating that the parties lacked the intent to enter into a contract under seal. Defendants further assert that granting their Motion is proper because there is no evidence of bad faith, undue delay, dilatory motive, or undue prejudice to Plaintiff.

By contrast, Frank contends that the Motion to Amend is futile. Essentially, he argues that the Supreme Court already has decided the issue as to whether the AIP constituted a sealed contract. Moreover, Frank argues that there are additional reasons to deny the Motion. In his view, by strategically relying on *American Telephone & Telegraph Co. v. Harris Corp.*,[12] Defendants caused undue delay by failing to assert until now the new counterclaims they seek to add. In addition, Frank asserts that he would be prejudiced unfairly if Defendants were allowed to bring those counterclaims at this late date.

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[12] 1993 WL 401864, at *7 (Del. Super. Sept. 9, 1993).

II. ANALYSIS

Motions for leave to amend are governed by Court of Chancery Rule 15. Rule 15(a) provides, in pertinent part, that where, as here, a responsive pleading has been filed, a party may amend its pleading "only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[13] Courts have interpreted this provision to allow for liberal amendment in the interest of resolving cases on the merits.[14] "A motion to amend may be denied, however, if the amendment would be futile, in the sense that the legal insufficiency of the amendment is obvious on its face."[15] That is, the motion may be denied if the proposed amendment would immediately fall to a Rule 12(b)(6) motion to dismiss.[16] Moreover, leave to amend should be denied if there is a showing of substantial prejudice, bad faith, undue delay,

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13 Ct. Ch. R. 15(a).

14 *See, e.g.*, *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7 (Del. Ch. May 21, 2008), *aff'd*, 962 A.2d 916 (Del. 2008) (TABLE) (citations omitted); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *3 (Del. Ch. Oct. 19, 2006).

15 *NACCO Indus., Inc. v. Applica Inc.*, 2008 WL 2082145, at *1 (Del. Ch. May 7, 2008).

16 *See St. James Recreation, LLC v. Rieger Opportunity P'rs, LLC*, 2003 WL 22659875, at *5 (Del. Ch. Nov. 5, 2003).

dilatory motive, or repeated failures to cure by prior amendment.[17] Ultimately, a motion for leave to amend is left to the sound discretion of the trial court.[18]

A. Has an Intervening Change of Law Occurred?

Defendants contend that the Supreme Court's *Whittington Remand* opinion constitutes an intervening change of law affecting the disposition of this case that warrants permitting an amendment of their pleadings, despite the admittedly late stage at which they filed their Motion. In support of this proposition, Defendants cite *Jackson v. Wilmington Housing Authority*,[19] in which the court permitted the Wilmington Housing Authority ("WHA") to amend its pleadings to add the defense of sovereign immunity. While the court ultimately granted WHA's motion, it also required that the plaintiffs be reimbursed a portion of their legal fees because the defense was not raised in a timely manner. Moreover, the court mentioned the passage of the County and Municipal Tort Claims Act, which "was a major change in the law of sovereign immunity," as a factor supporting allowance of a belated amendment.[20]

The facts of this case are distinguishable from *Jackson*. Here, there were two competing lines of cases on the question of whether the term "seal" in connection with a

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17 *See, e.g., Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7; *Crowley*, 2006 WL 3095952, at *3; *NACCO Indus., Inc*, 2008 WL 2082145, at *1.

18 *See, e.g., Nat'l Installment Ins. Servs., Inc*., 2008 WL 2133417, at *7 (citing *Bokat v. Getty Oil Co.*, 262 A.2d 246, 251 (Del. 1970)); *NACCO Indus., Inc.*, 2008 WL 2082145, at *1.

19 1986 WL 630317, at *1 (Del. Super. Feb. 6, 1986).

20 *Id.*

signature on a commercial contract that was not a deed, mortgage, or other type of traditionally recognized specialty document and for which there was no other indication of intent by the parties to place the contract under seal was sufficient to warrant affording that document the twenty-year limitations period given to specialties, as opposed to the usual three-year limitations period for contracts. The Delaware Supreme Court had not specifically addressed the issue. One view, expressed in *In re Beyea's Estate* in 1940, held that the word "seal" was sufficient to make a document a contract under seal.[21] The other view, espoused in *AT&T* in 1993, held that the presence of the word "seal" printed next to each signature line was not sufficient, in itself, to make a commercial agreement a contract under seal.[22] The Supreme Court clarified the law in the *Whittington Remand* by holding that the rule set forth in *In re Beyea's Estate* is the correct one.

Defendants knew about the *In re Beyea's Estate* decision and briefed it in connection with their motion for summary judgment in this case.[23] In that regard, they easily could have included in their pleadings from the outset, as an alternative position, the counterclaims they now seek to add. Those new counterclaims allege that Defendants never intended or understood the AIP to have been a contract under seal or that it, therefore, would be subject to a twenty year statute of limitations. Thus, they assert that,

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21 15 A.2d 177 (Del. Orph. Ct. 1940).

22 *Am. Tel. & Tel. Co. v. Harris Corp.*, 1993 WL 401864, at *7 (Del. Super. Sept. 9, 1993)

23 D.I. 124, Rep. Br. in Support of Defs.' Joint Mot. for Summ. J., at 7.

even if the *In re Beyea's Estate* rule governs, the AIP should be reformed to eliminate the seal, because it resulted from either a mutual or unilateral mistake. Nothing prevented Defendants from making such an argument long before trial of this case. Consequently, their reliance on what they characterize as an intervening change in the law provides no basis for accepting such a belated amendment to their Answer and Counterclaim.

While admitting that their Motion comes unusually late in the proceedings, Defendants nonetheless argue that they are not guilty of undue delay. In support of this, they assert that the issue of whether the parties intended the AIP to be sealed was irrelevant at trial in light of this Court's June 6, 2008 Memorandum Opinion, which held that the word "seal" alone, as it appears in the AIP, was insufficient to create a sealed document. Defendants further argue that they promptly moved to amend as soon as they believed that intent with regard to the sealed nature of the AIP was at issue—*i.e.*, after the *Whittington Remand* and my February 15, 2010 Memorandum Opinion.

Plaintiff filed this action on July 20, 2006, over four and a half years ago. In that context, I conclude that, if granted, Defendants' Motion to Amend to add counterclaims based on facts and potential legal arguments that were known to Defendants from the outset of this litigation would cause undue delay. Even if Defendants did not realize the importance of the facts they now seek to assert by way of amendment until the litigation regarding laches became more focused, they still could have included their counterclaims and taken full discovery regarding them in ample time to present those claims in the trial held in November 2008. Since then, this action has been before the Delaware Supreme Court on two separate occasions on the procedural issue of laches. The time has come to

address the merits of this dispute. Defendants' request that the Court entertain further litigation on laches simply comes too late.

B. Would the Proposed Amendment be Futile?

Defendants argue that if their Motion is granted and they succeed in showing that the parties lacked the intent to enter into a sealed contract, they will be entitled to reformation of the AIP. In urging this Court to grant their Motion, Defendants also contend that the Supreme Court has not provided any indication as to whether they should be able to amend their Answer and Counterclaims. But, I consider both of these propositions dubious.

Contrary to the subjective interpretation Defendants ascribe to the Supreme Court's decision in the *Whittington Remand*, that opinion fairly can be read as being intended to create an easily applied, bright line rule relating to sealed documents. That is, in the absence of contradictory evidence, "the word 'seal' next to an individual's signature is all that is necessary to create a sealed instrument, 'irrespective of whether there is any indication in the body of the obligation itself that it was intended to be a sealed instrument.'"[24] Nothing in the *Whittington Remand* opinion suggests that the Court intended to allow the parties to a contract bearing the word "seal" to avoid the consequences of that by introducing extrinsic evidence of their subjective intent. Therefore, it seems highly unlikely that Defendants could obtain reformation of the AIP

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[24] *Whittington v. Dragon Gp. L.L.C.*, 2009 WL 4894305, at *14 (Del. Dec. 18, 2009) (citing *Fed. United Corp. v. Havender*, 11 A.2d 331, 343 (Del. 1940)).

to effectively eliminate the word "seal," based on evidence of their subjective intent in entering that agreement.

Moreover, even if Defendants were able to overcome these significant legal hurdles, the likely remedy would be reformation of the AIP and further litigation about laches. Frank has a legitimate argument, however, that the Supreme Court already has considered this possibility and rejected it. In their briefing to the Supreme Court regarding *Whittington III*, Defendants requested that "if the Court does not reverse the laches ruling in *Whittington III*, the Court should remand this case to permit Defendants to present evidence of mutual mistake."[25] Against this background, it is highly significant that the Supreme Court pointedly stated in its order affirming *Whittington III* that this case was remanded "for consideration of Plaintiff's claims on the merits."[26] I think that language implies an intent to move promptly beyond the issue of laches. Accordingly, even if reformation to avoid the seal may be possible in the abstract, the history of this case indicates that the Supreme Court probably does not consider it appropriate here.

Therefore, Defendants' Motion more than likely would be futile because it appears to be inconsistent with both the *Whittington Remand* and the Supreme Court's most recent order.

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[25] D.I. 231, Frank Whittington's Ans. Br. in Opp. to Mot. to Amend, Ex. C 14-15. This request is tantamount to seeking the leave to amend sought by Defendants' Motion.

[26] D.I. 222.

C. Would Granting the Proposed Amendment Cause Frank to Suffer Undue Prejudice?

Defendants contend that Plaintiff, Frank Whittington, would suffer no prejudice if the Motion to Amend were granted. They claim he has been on notice for more than two years that the significance of the word "seal" next to the signature block in the AIP was at issue. They further assert that, because little, if any, additional discovery is likely to be necessary, the proceedings on the new Counterclaims would be unlikely to consume much time.

"'Prejudice to the nonmoving party is the touchstone for the denial of an amendment.'"[27] Frank now has been waiting for almost five years for the merits of his case to be decided. Granting Defendants' Motion undoubtedly would extend these proceedings for several more months, at a minimum. The merits of this case have been tried and argued. Based on the long and tortuous history of this dispute, I find that any further postponement of the adjudication of the merits of the parties' respective positions would be unduly prejudicial to Frank, and specifically to his interest in having his claims adjudicated expeditiously.

Based on all of these reasons, individually and collectively, I conclude that Defendants' Motion should not be granted.

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[27] *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7 (Del. Ch. May 21, 2008), *aff'd*, 962 A.2d 916 (Del. 2008) (citing *Zen Invs., LLC v. Unbreakable Lock Co.*, 2008 WL 1823428, at *4 (3d Cir. Apr. 24, 2008) (quoting *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984))).

III. CONCLUSION

For the reasons stated, Defendants' Motion to Amend is denied.

IT IS SO ORDERED.